No. 1184

In the Supreme Court of the United States

October Term, 1941.

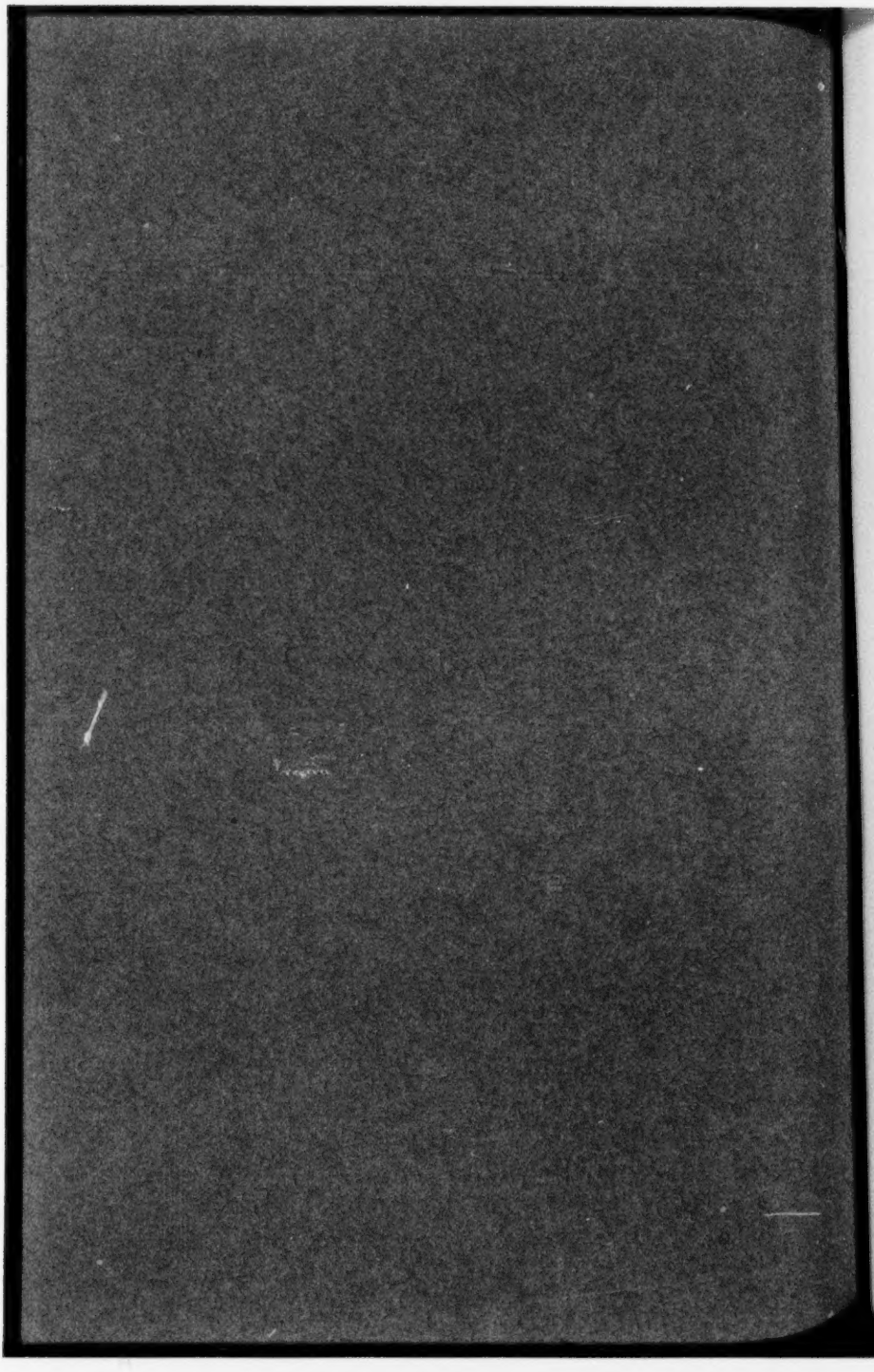
O. O. OWENS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

O. O. OWENS,
Petitioner,
Tulsa, Okla. Pro Se.



Corrected Index to Petition for Writ of *Certiorari* and Brief of O. O. Owens, Petitioner, in *Owens* v. *Commissioner of Internal Revenue*, No. 1184, October Term 1941.

INDEX TO PETITION FOR WRIT.

INDEX TO BRIEF.

POINT 1. As ground for this Court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the Receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919 (and unappealed from) of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of

PAGE

Reference to Judicial Code.

Reference to Congressional Acts.

Cases Cited.

On Capital "Outlay" or Investment:

IN THE SUPREME COURT OF THE UNITED STATES.
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O. O. OWENS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is a proceeding to determine the correctness of a deficiency in petitioner's income tax for 1920 resulting from disallowance by respondent of an expense or loss deduction.

In April, 1926, petitioner filed with the United States Board of Tax Appeals his petition for redetermination of a much larger deficiency. After prolonged delay a Memorandum Opinion (Rec. 51-52) and Decision (Rec. 60), resulting from the intercession and consequences of the acts

of unauthorized attorneys, were rendered October 8 and 11, 1932, respectively—and by Board order vacated and set aside on July 29, 1938, and the case set for hearing on the merits. (Rec. 152-153)

At a Board docket held in Tulsa, Oklahoma, in April, 1939, all items, transactions and issues, except the transaction and issue involved in this review, were disposed of by agreements and stipulations between counsel for petitioner and respondent (Rec. 164, 165), whereby the originally claimed deficiency was substantially reduced. (Rec. 164, 165, 469, 624)

Hearing on the issue here presented was continued to the Washington calendar of the Board and heard November 9 and 10, 1939 (Rec. 165-358). The Board's decision, sustaining and affirming the reduced deficiency of $28,-260.61, was entered February 13, 1941 (Rec. 624). An appeal was taken by Petitioner to the United States Circuit Court of Appeals for the Tenth Circuit, and the decision of the Board was affirmed by opinion and decree rendered January 13, 1942 (Rec. 645-651, 652). Petition for rehearing was denied February 26, 1942 (Rec. 690). The following is a statement of the matter involved:

In the late winter of 1898-1899, Barney Thlocco, a full-blood Creek Indian, and all his children and grandchildren died from a smallpox scourge within a short space of time, the only survivor of the family being Annie, the wife of Thlocco's son, John. No records of the dates and order of their deaths were made and such could not later be established. Annie, who died later, married Saber Jackson. Martha Jackson was the only child of that marriage. *McKinney* v. *Black Panther Co.*, 282 Fed. 486. (Rec. 634)

Subsequent to his death a 160-acre tract of land, now in Creek County, Oklahoma, was allotted to Thlocco (Rec.

194, 300, 304). The United States, in February, 1911, brought suit in the United States District Court for the Eastern District of Oklahoma, against the unknown heirs of Thlocco to cancel the allotment made to him, and in July, 1911, a decree, cancelling the allotment and ordering the 160 acres restored to the Creek Nation and sold on advertisement, was entered *pro confesso* (Rec. 195, 632).

Later oil was discovered in the vicinity of Thlocco's allotment. In 1913, J. Coody Johnson, an attorney at law, by written contracts with Saber Jackson, for himself individually and as guardian of Martha Jackson, was employed to manage, conduct and prosecute a suit in behalf of Martha Jackson, as sole heir of Thlocco, for the recovery of the 160-acre allotment. It was agreed that if Johnson should succeed in establishing Martha's heirship, he should have an oil and gas lease on the land; if he failed, he would get nothing for his services. In August, 1913, Saber Jackson, as guardian of Martha, and in November, 1913, Saber, for himself individually, executed oil and gas leases covering the allotment to Johnson, which were approved by the proper Probate (County) Court (Rec. 633, 315).

Johnson succeeded in getting the *pro confesso* decree set aside. Thereupon the suit was voluntarily dismissed and the United States at once filed a new suit in the same court against Bessie Wildcat, Martha Jackson, a minor, Saber Jackson, as her guardian, and some fifteen others, as heirs of Thlocco—and also against Johnson and the Black Panther Oil & Gas Company, to which Johnson had assigned his lease—as defendants (Rec. 633, 195). In April, 1914, such District Court appointed a Receivier and directed him to lease the land for oil and gas purposes for the term of the receivership, at a royalty of twenty-five per cent (25%) of the gross revenue and income, to be held for the benefit of the rightful owners to be ultimately determined. On April 30, 1914, the Receiver, in accordance with the order, entered

into a lease with the Black Panther Oil & Gas Company (Rec. 195), under which the property was initially and completely developed and one-fourth of the proceeds from oil and gas produced were impounded in the custody of the Receiver.

Between November 1, 1913, and May 3, 1915, approximately 225 Indians and others entered appearances in the suit, each claiming that he was an heir of Thlocco, or the assignee or vendee of an heir (Rec. 195).

On May 8, 1915, the District Court entered a decree against the United States, adjudging the allotment to be valid (Rec. 195). This decree was affirmed by the Supreme Court of the United States on May 21, 1917 (Rec. 196). *United States* v. *Bessie Wildcat*, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. ed. 1024. (Petition for rehearing thereon was denied in February, 1918 (Rec. 633).) This left for determination the question of the heirship of Thlocco and the ownership of his allotment and estate (Rec. 196, 633), jurisdiction to determine such question having been expressly reserved by the District Court in rendering its decree *(supra)*.

It was realized by all who asserted heirship that it was impossible to obtain certain and definite proof of the dates of the deaths of Thlocco and his children and grandchildren, and there was chance of casting the lines of descent in many different ways. Martha Jackson admittedly was not of Thlocco's blood. Her case at best was doubtful, both in fact and law (Rec. 634).

On July 6, 1916, Saber Jackson, in consideration of $10,000.00 in cash and an agreement to pay him an additional equal amount out of the impounded royalties, conveyed by deed his *contested and unadjudicated claim* to an estate by the curtesy to one Morley, acting as agent for petitioner, James Brazell and J. Coody Johnson. On August 6, 1916, Morley conveyed such interest by deed to his principals (Rec. 196).

On July 9, 1917, R. W. Parmenter, as guardian of the estate of Martha Jackson, entered into a contract with one Kelly, acting as agent for petitioner, Brazell and Johnson, whereby such guardian agreed to convey, and by deed of that date conveyed, Martha's *contested, unestablished and unadjudicated claim* to, and interest (if any) in, such allotment and impounded royalties to Kelly. In consideration therefor, Kelly, paid $12,000.00 in cash, and in addition, agreed to pay twenty-five per cent (25%) of the impounded royalties to which Martha might become entitled by judicial decree upon final determination in the District Court or by compromise in the aforesaid suit. Kelly further agreed to diligently and faithfully prosecute the establishment of Martha Jackson as an heir of Thlocco, and to have decreed to her the largest possible interest in the allotment and defeat or purchase all adverse claims (Rec. 196-197). Such contract and deed by the guardian were approved as provided by law by the County Court of Seminole County, which court had exclusive jurisdiction of Martha Jackson's person and estate. On July 24, 1917, Kelly transferred the interest so acquired to his principals, who assumed Kelly's contractual obligations (Rec. 196-197).

On February 26, 1918, petitioner, Brazell and Johnson, as first parties, entered into a contract with the Black Panther Company, as second party, whereby said company agreed to perfect at its expense their title to the Thlocco estate. This contract, after reciting the receivership, the lease by the Receiver, the prior leases by Saber Jackson and by the guardian of Martha Jackson, each of which provided for a one-eighth (1/8) royalty (but under which no oil or gas had been produced), and the assignment of the Jackson leases to the Black Panther Company, further provided:

> "*Whereas*, a question has arisen as to whether the before mentioned contract with said Saber Jackson was ever intended to bind the said party of the second

part, or its assigns, for the payment to the said Saber Jackson of the said one-eighth (1/8) royalty, and,

"*Whereas,* the parties of the first part have by purchase become the owners of whatever interest the said Martha Jackson and the said Saber Jackson have heretofore held in said property, as well as whatever interest the said Martha Jackson and the said Saber Jackson have in and to the royalties collected by the receiver before mentioned under order of the court, and,

"*Whereas,* it is desired by both parties to this agreement to settle this controversy,

"*Now, therefore,* this contract witnesseth:

"*First.* Parties of the first part are to receive one-half (1/2) of all the monies held by said receiver when the same shall finally be distributed under the order of the court, and are further to receive thereafter one-eighth (1/8) of all the oil and gas produced from said premises the same being the royalty interest due under the said Martha Jackson lease.

"*Second.* The party of the second part is to receive one-half (1/2) of the monies held by the said receiver when the same shall be finally distributed under the order of the court and out of said funds so received the party of the second part shall pay all expenses heretofore incurred, or that may be hereafter incurred, in vesting the title in and to said property in the said Martha Jackson. It being the intention of this agreement that the parties of the first part do hereby release unto the party of the second part, *upon the conditions heretofore expressed,* all claim in and to said monies and property by virtue of the claim of said Saber Jackson, and it being further understood that after the discharge of the receivership the royalty upon said property to be paid by the party of the second part to the parties of the first part shall be one-eighth (1/8) of the oil and gas produced therefrom free from any claim from the party of the second part upon said one-eighth (1/8) royalty." (Italics ours.) (Rec. 197-199)

Proceeding under Section 6 of the Congressional Act of May 27, 1908, 35 Stat. 312, the Secretary of the Interior interceded on the ground that Martha Jackson's sale contract of July 9, 1917, was ambiguous and uncertain as to the amounts Martha was to receive (Rec. 471). Because of that intercession, on May 11, 1918, Owens (petitioner), Brazell and Johnson, acting through Kelly, their agent, and Black Panther Company entered into a supplemental contract with Parmenter as guardian of Martha Jackson, which construed the prior contract of purchase, dated July 9, 1917, to provide:

> " * * * that if Martha Jackson is adjudged either by final adjudication of her title thereto, or by final settlement between the parties claiming same, to be the *owner* of said allotment of Barney Thlocco, that there shall be paid *to her guardian* the sum of One Hundred Eleven Thousand Six Hundred Seventy Dollars Seventy-four Cents ($111,670.74), in addition to the sum of Twelve Thousand ($12,000.00) heretofore paid, making a total of One Hundred Twenty-three Thousand Six Hundred Seventy Dollars Seventy-four Cents ($123,670.74), and *an additional sum that will equal twenty-five per cent (25%) of one-eighth (1/8) of the proceeds derived from the sale of oil and gas from said allotment from March 31, 1918, up to and including the determination of her interests by judgment and decree of the District Court of the United States for the Eastern District of Oklahoma, said twenty-five per cent (25%) of one-eighth (1/8) as aforesaid to be subject to any claim for expenses and administration of receivership* and all overpaid royalties by the lessees of the receiver that may be allowed by the District Court of the United States for the Eastern District of Oklahoma. It being the express purpose and intention of the parties hereto that the said Martha Jackson in addition to the said sum of One Hundred Twenty-three Thousand Six Hundred Seventy Dollars Seventy-four Cents ($123,670.74), shall have and receive one-fourth (1/4) of the one-half (1/2) of the impounded *royalties after March 31, 1918,*

> *after such claims as said funds may be subjected to have been paid,* and it is further agreed that from and after the date of said decree by the District Court of the United States for the Eastern District of Oklahoma, the said Thomas Kelly and Black Panther Oil and Gas Company shall succeed to her interest in all the royalties," (Italics ours.) (Jt. Ex. A-1, Rec. 295-296.)

and that Kelly and the Black Panther Company should immediately, faithfully and diligently undertake to purchase, at their own cost and expense, all claims adverse to Martha Jackson, and that all such claims theretofore or thereafter purchased, or contracted to be purchased, should be merged with the claim of Martha Jackson; and as to any claims theretofore or thereafter purchased, or contracted to be purchased by them, *Kelly and the Black Panther Company agreed, in behalf of such claimants, that a decree should be entered adjudging Martha Jackson the owner of said allotment, or should the decree be entered in favor of any other claimant the benefits thereof should inure to Martha Jackson, in determining her rights under the purchase contract and deed dated July 9, 1917.* A bond in the amount of $125,000.00 was given to guarantee the performance of such contract. (Jt. Ex. A-1, Rec. 296.)

In carrying out the obligations so assumed the Black Panther Company and its assignee, Bay State Oil & Gas Company, subsequently expended $395,480.34, of which $315,274.10 was expended in 1918 (Rec. 199).

On August 3, 1918, Kelly conveyed to James Brazell an undivided three-eighths (3/8), to O. O. Owens (petitioner) an undivided three-eighths (3/8), and to J. Coody Johnson an undivided two-eights (2/8) of the Martha Jackson claim to the Thlocco estate (Rec. 199).

Prior to October 7, 1918, *the Black Panther Company purchased and merged all, except one, of the claims to the Thlocco estate asserted adversely to that of Martha Jack-*

son. On October 7, 1918, Brazell, Owens and Johnson, pursuant to the contract of February 26, 1918 (supra), conveyed to Black Panther Company, their interest in the Saber Jackson interest or claim to the Thlocco estate (Rec. 199).

The single outstanding claim was not purchased because it was known to be groundless and based on fraud. In a trail in December, 1918, in the District Court, such unpurchased claim was proven to be fraudulent (Rec. 267).

On June 17, 1919, the United States District Court for the Eastern District of Oklahoma entered a decree adopting and ratifying the purchase contract of July 9, 1917, and the construing contract of May 11, 1918, and adjudging and decreeing that on or before July 9, 1917, Martha Jackson was the *lawful owner* of the Thlocco allotment and all royalties and income therefrom impounded by the Receiver; and quieted and perfected the title of petitioner and his associates, Brazell and Johnson, as her successors and vendees, to said allotment and funds and awarded them possession thereof,

> "*(1)* Save and except the necessary expenses of said receivership and the administration thereof;
>
> "*(2)* Subject to the claim of Martha Jackson for the sum of One Hundred, Eleven Thousand, Six Hundred, Seventy Dollars and Seventy-four Cents ($111,670.74) plus 25% of one-eighth of the proceeds derived from said lands between the 31st day of March, 1918, *and this date*, the foregoing amount, however, to be paid to Martha Jackson to be subject, as heretofore set out in this decree to her proportionate part of the expense and charges herein detailed, said proportionate part being one-eighth (1/8) of the entire expenses," (Italics ours.)

and reserved jurisdiction to adjust the equities between Petitioner, Brazell and Johnson and the Black Panther Oil & Gas Company and the Bay State Oil & Gas Company, and

between said companies, arising out of the contract of February 26, 1918, *(supra)* and arising out of other contracts between the two companies, until the petition to intervene filed by Saber Jackson had been determined by said court (Jt. Ex. B-2, Rec. 297).

About June 17, 1919, one W. E. McKinney, claiming to be the guardian of Martha Jackson, an incompetent—by virtue of appointment of the County Court of *Okfuskee County, Oklahoma*—filed an application for leave to intervene in the aforesaid suit, and to challenge the validity of her contracts and conveyances, which application was promptly denied (Rec. 199, 366, 447, 639).

On September 9, 1919, the court entered a decree dismissing the intervention of Saber Jackson (Rec. 200) and adjusting the equities of the Black Panther and Bay State companies, petitioner, Brazell and Johnson, in conformity with the prior contract of February 26, 1918, *(supra)* and the contract of May 11, 1918, *(supra)* and further adjusting the equities between the two companies in the Saber Jackson half of the impounded funds (Rec. 308, 366, 488).

On September 13, 1919, Saber Jackson and W. E. McKinney, as guardian of Martha Jackson, each appealed *from the respective orders of the District Court denying Saber's intervention and McKinney's petition for leave to intervene* (Rec. 200, Ex. 4, Rec. 631, Ex. 20, Rec. 632-644, Rec. 366, 447).

On February 25, 1920, Parmenter, the lawful guardian of Martha Jackson, an incompetent, commenced an original proceeding in the Supreme Court of Oklahoma against McKinney and the Judge of the County Court of Okfuskee County, Oklahoma, who undertook to make the appointment of McKinney as guardian, and prayed that a writ of prohibition might issue commanding the respondents to desist and refrain from further interference in the matter of the guard-

ianship of Martha Jackson. The writ, as prayed for, was issued March 29, 1921 (Rec. 631, 640, 641). (McKinney filed petition for rehearing which was denied September 13, 1921.) (Rec. 640, 641)

On May 6, 1920, the Secretary of the Interior entered his "judgment" and order, as follows:

"Department of the Interior,
Washington, D. C.

ORDER OF APPROVAL.

"*Re* application of Black Panther Oil & Gas Company, and the Bay State Oil & Gas Company, for the approval of a contract between R. W. Parmenter, guardian of Martha Jackson, Thomas Kelly and the Black Panther Oil & Gas Company, dated May 11, 1918; the application of the Black Panther Oil & Gas Company and the Bay State Oil & Gas Company, for the approval of oil and gas leases executed by Saber Jackson, as guardian of Martha Jackson, and by Saber Jackson, individually, covering the Barney Thlocco allotment, together with the respective contracts of employment in connection with the granting and making of said oil and gas leases.

"*The application heretofore made for the approval of the contract of May 11, 1918, made and entered into between R. W. Parmenter, as guardian of Martha Jackson, and Thomas Kelly and the Black Panther Oil & Gas Company, was withdrawn by the petitioners and is therefore not passed upon except in so far, if at all, as the same is in conflict with this order,* and if so the same is to that extent only disapproved. The said contract of May 11, 1918, has not heretofore been approved by the Secretary of the Interior or the Interior Department, as was erroneously recited in the decree of Hon. FRANK A. YOUMANS, Judge, dated June 17, 1919, in *The United States of America* v. *Bessie Wildcat, et al.,* Case 2017, equity, in the United States Court for the Eastern District of Oklahoma.

"*It is ordered* that the oil and gas lease executed by

Saber Jackson, as guardian of Martha Jackson, with J. Coody Johnson, under date of August 26, 1913, together with the contract of employment, dated June 30, 1913, by and between J. Coody Johnson, party of the first part, and Saber Jackson, as guardian of Martha Jackson, a minor, parties of the second part, and the oil and gas lease dated November 13, 1913, executed by Saber Jackson individually to J. Coody Johnson, together with the contract of employment between Saber Jackson individually and J. Coody Johnson, dated November 13, 1913, be and the same are hereby approved. The said leases cover the Barney Thlocco allotment, to-wit: the NW4 of Sec. 9, T. 18 N., R. 7 E., Creek County, Oklahoma, and were made as the consideration for the said employment contract.

"This controversy involves the interest of Martha Jackson, a minor, to the royalties in the hands of the receiver in the case of *United States of America* v. *Bessie Wildcat, et al.*, from the inception to the date on which the fee of the said real estate was conveyed by R. W. Parmenter, guardian, to Thomas Kelly, July 9, 1917, the validity of which conveyance is not involved in this proceeding and is not passed upon.

"The Secretary of the Interior is of opinion that in view of the said leases made to J. Coody Johnson in 1913, as aforesaid, the conduct of the parties subsequent thereto, including the contract of February 26, 1918, between the Black Panther Oil and Gas Company, James Brazell, O. O. Owens, and J. Coody Johnson, purporting to dispose of said royalties; that the said J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, and all persons claiming by, through, or under them, or any of them, are conclusively estopped from denying that the said Martha Jackson is entitled to receive less than the full one-eighth royalty mentioned in the lease so executed by her guardian, being one-half of the royalties accumulated prior to said conveyance and now in the hands of the receiver; *and the secretary finds, as a matter of fact,* that she is entitled to receive said one-eighth, her interest amounting

as of the date of the conveyance to Thomas Kelly, as aforesaid, to the sum of $325,000 approximately.

"This order is not intended to affect the rights of any of the parties to any other matter involved in litigation but merely to dispose of the interest of Martha Jackson in the royalties accumulated in the hands of the receiver up to the date of the conveyance aforesaid. If the result of litigation should be to give to the said Martha Jackson an interest in said royalties subsequent to July 9, 1917, the proceeding is retained in the department for such other action or order as the circumstances may then make necessary.

"Dated this sixth day of May, 1920.

(Signed): John Barton Payne,
Secretary of the Interior."

(Pt. Ex. 5; Rec. 314, 316.) (Italics ours.)

The secretary later promulgated a similar "judgment" and order in respect of Saber Jackson (Rec. 320-323). Saber was then declared incompetent by the County Court of *Okfuskee County,* and the same W. E. McKinney, who had been previously appointed by that court as guardian of Martha, was appointed guardian of Saber, and later substituted for Saber as appellant in his appeal from the order of the District Court, denying his intervention and dismissing his petition. The appointment of McKinney, as guardian of Saber, was not contested (Rec. 367).

The conduct of McKinney, the pretending guardian, while perfecting his appeal from the court's order denying him leave to intervene, the contest between Parmenter, the legal guardian, and McKinney, and the acts and efforts of the Secretary of the Interior, his agents and subordinates, as well as McKinney's efforts, to enforce the secretary's "judgment" and orders, prevented during 1920 the distribution of the impounded funds (Pt. Ex. 20; Rec. 632-644). To avoid further delay, *on or about December 5, 1920,* the

Black Panther Company and Brazell, petitioner and Johnson, on the one hand, entered into a contract with *McKinney,* as guardian of Martha Jackson, on the other hand—conforming to the demands of the Secretary of the Interior in respect of *payment* to Martha Jackson—whereby Brazell, petitioner and Johnson (instead of the Black Panther Company) unconditionally transferred, relinquished and assigned to Martha Jackson sufficient of their impounded funds to comply with the Secretary's Order (Rec. 279-285; Board's findings, Rec. 478, 479). Petitioner's share of such funds so transferred amounted to $75,989.20.

Pursuant to such contract, stipulation providing the transferred, relinquished and assigned funds should be delivered to the Superintendent for the Five Civilized Tribes for the use and benefit of Martha Jackson, signed by attorneys for McKinney as guardian of Martha Jackson, and by attorneys for Parmenter, her legal guardian, was filed in the Circuit Court (Pt. Ex. 17; Rec. 338, 339).

After denial September 13, 1921, by the Supreme Court of Oklahoma of McKinney's petition for rehearing, a "Supplemental Contract," dated October 22, 1921, with McKinney omitted and Parmenter substituted therein for him as guardian of Martha Jackson, providing for modification of the final decree of June 17, 1919, to direct distribution of Martha Jackson's funds to the Superintendent of the Five Civilized Tribes *(as demanded by the secretary)* instead of to her guardian, Parmenter, and relieving her of the administration expense, was signed by the parties to the *December 1920 contract* with McKinney, and a new stipulation, with the "Supplement Contract" attached, was filed in the Circuit Court. (Jt. Ex. C-3; Rec. 310. Pt. Ex. 20; Rec. 642.)

On March 25, 1922, the Circuit Court of Appeals approved such "Supplement Contract" and directed that the decree of the District Court be modified accordingly and in

no other respect, and that the District Court direct immediate transfer of $308,000.00 of the impounded funds to the Superintendent of the Five Civilized Tribes for the use and benefit of Martha Jackson (Pt. Ex. 20; Rec. 632-644).

Actual distribution and transfer of the money to the superintendent was made by the Receiver in September, 1922 (Rec. 200).

Further distribution of the impounded funds was prevented pending settlement, on behalf of Saber Jackson, with the Black Panther Company. On February 3, 1923, the Circuit Court approved the settlement between McKinney, as guardian of *Saber* Jackson, an incompetent, substituted for Saber Jackson as appellant, and the Black Panther Company and Bay State Oil & Gas Company (Rec. 201). Thereafter, in June, 1923, after adjustment and settlement of all administration expense and impounding $100,000.00 with the clerk of the District Court for the Eastern District of Oklahoma to pay ad valorem tax claims asserted by the taxing authorities of several Oklahoma counties (Rec. 607), distribution of the remaining impounded funds was made (Rec. 201).

Petitioner contends he was on the accrual basis for reporting taxable income. Petitioner took the deduction of $75,989.20 here in controversy as part of his expense sustained in 1920 in abating, in part, the aforesaid nuisances and attempting to expedite distribution (Rec. 288-291).

On February 13, 1926, respondent determined a deficiency against petitioner in the amount of $36,116.86 (Rec. 34-35). One of the items making up such deficiency was the disallowance of the deduction of $75,989.20.

In petitioner's original petition filed April 24, 1926, with the United States Board of Tax Appeals, two items or transactions were included. One was the disallowance of the aforesaid deduction. In such original petition the secre-

tary's "judgment" and order of May 6, 1920, was pleaded as the cause of the "loss sustained by virtue of judgment rendered, wherein taxpayer was compelled to relinquish in and to certain impounded funds purchased in 1918." (Rec. 32-37)

On July 6, 1926, respondent filed his answer, which was never amended, in which he admitted petitioner and his associates

> " * * * acquired a portion of the interests of Martha and Saber Jackson in a certain 160-acre tract, located in Creek County, Oklahoma, known as the Barney Thlocco allotment, and alleges that under the terms of said agreement any royalties accrued up to the date of purchase, to-wit, July 9, 1917, were to belong to the vendors.
>
> "Admits that the title to the property has been in litigation and that in 1917 the Supreme Court of the United States held that Martha and Saber Jackson were the legal owners of the allotment.
>
> * * * * * * * * and
>
> "Specifically denies that the taxpayer is entitled to any deduction on account of the award to Martha Jackson of $195,000, and alleges that the taxpayer had never treated or reported the $75,989.20, which he now seeks to take as a loss, as taxable income to him, and that said amount is to be deemed either a part of the purchase price paid by the taxpayer and his associates, or is to be regarded as a portion of the interests of Martha Jackson which were not acquired by the taxpayer and his associates." (Rec. 38-39)

At the conclusion November 10, 1939, of the continued hearing on the merits of the instant case, petitioner directed the Board Members' attention to his desire to amend his petition to conform to the proof, to which no objection was made by respondent (Rec. 293-294). Concurrently with his brief, petitioner tendered, with appropriate motion for leave to file, his amended petition conforming to the proof, in

which the deduction was pleaded as expense, as a loss, and as expense that resulted in a loss (Rec. 359-378). Subsequently, upon discovering new evidence, petitioner tendered, with appropriate motion for leave to file with the Board, his second amended petition in which the deduction was again identically pleaded (Rec. 440-465). Leave to file both such amended petition and second amended petition were denied (Rec. 480).

On October 8, 1940, the Board rendered its Memorandum Findings of Fact and Opinion (Rec. 468-481), in which it correctly found the existence of the McKinney 1920 contract or stipulation and parenthetically defined the substance thereof as "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), but in said opinion the Board confused and misstated other material and decisive facts, and so stated such facts as to make it appear that Saber and Martha Jackson had each appealed from the *final decree* of the District Court rendered June 17, 1919, *supra* (Rec. 305)—and the Board also confused *distribution or transfer* (by one trustee for Martha Jackson to another in 1922, of the funds assigned, relinquished and transferred to Martha by the December 1920 contract between McKinney and petitioner and his associates), with *payment*—

And held that, *on the cash basis* of reporting income for 1920, the deduction should be denied because no *payment* (confused with distribution) had been made by petitioner until 1922—

And further held that, *on the accrual basis* of reporting income, the deduction should be denied because the appeals taken by Martha and Saber Jackson created a contingency on petitioner's ownership of the impounded funds until March 25, 1922 (the date of rendition by the Circuit Court of Appeals for the Eighth Circuit of its opinion in *McKin-*

ney v. *Black Panther Company*, 280 Fed. 486 *(supra)*, affirming the trial court's order denying McKinney (Martha's pretending guardian) leave to intervene and approving the settlement and modification of the District Court's decree to provide for distribution of Martha Jackson's money to the Superintendent of the Five Civilized Tribes instead of to her legal and lawful guardian)—and also held that such contingency on petitioner's ownership of the impounded funds created a contingency on the payment by petitioner to Martha Jackson by the December 1920 contract (with McKinney). (Rec. 479)

In response to petitioner's motion (Rec. 481-521), the Board, by order entered November 30, 1940 (Rec. 522-523), revised its findings of fact to state *that the appeals taken by Martha (McKinney) and Saber Jackson were from orders denying petitions or pleas for leave to intervene* (thus correctly reflecting the facts and true situation that no appeals were taken from the *final decree (supra)*, and consequently no contingency existed on petitioner's ownership of the impounded funds nor on his payment to Martha Jackson by the December 1920 contract). However, the Board did not revise its conclusions of law to conform to its modified and corrected findings of fact, but left, unchanged, such conclusions and its decision based upon the confused, mis-stated and erroneous statement of facts, *viz.*, that Martha and Saber had appealed from the *final decree*. (Rec. 522-523)

Petitioner appealed to the Circuit Court of Appeals for the Tenth Circuit. On January 13, 1942, that court rendered its decree (Rec. 652) affirming the Board's decision denying the deduction, and concurrently rendered its opinion (Rec. 645-651) holding that the deduction in controversy was "*a capital outlay,*" and further holding, in substance and effect, that *payment made to expedite distribution of impounded income* (with title thereto finally adjudicated and possession awarded by final decree, unappealed from, of a

court of exclusive jurisdiction,—and free from adverse claims) *from lands or other property is capital investment in such land or property,* which rule is contrary to all (and particularly those of other Circuit Courts and of the United States Supreme Court hereinafter cited) previous judicial and Treasury Department constructions and interpretations of the Revenue Acts and rules and regulations in respect of deductions for expense or loss. Petition for rehearing thereon was denied February 26, 1942 (Rec. 690).

II.

Basis Upon Which It Is Contended That This Court Has Jurisdiction.

(1) This Petition for *Certiorari* is prosecuted pursuant to the provisions of Section 240 of the Judicial Code as amended (Title 28, Sec. 247, U. S. C. A.).

(2) The Opinion (Rec. 645-651) and Decree (Rec. 652) of the Circuit Court of Appeals sought to be reviewed were filed January 13, 1942. Petition for Rehearing was filed February 12, 1942 (Rec. 653-689), and denied by court order entered February 26, 1942 (Rec. 690).

III.

Questions Presented.

The questions presented by this petition are:

(1) Whether the assignment, relinquishment and transfer by petitioner of $75,989.20 of his impounded income (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) to Martha Jackson, by December, 1920 contract with McKinney to expedite distribution of impounded income, was *specifically additional consideration for the land* as contended by respondent before the Circuit Court—or was capital "out-

lay'' and transferred ''in order 'to adjust the matter' and effectuate a distribution of the entire fund,'' and therefore not deductible as held by the Circuit Court.

(2) Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,

Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income*, in the year the funds are transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties each claiming the right to act as trustee for transferee and receive the transferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties.

(3) Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income

therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in others to and awarding possession of such property and impounded income or funds—by appealing from an order of the trial court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trustee.

IV.

Reasons Relied Upon for Allowance of Writ.

There are "special and important" reasons for allowance of the writ. These are:

(1) The Circuit Court, in its opinion filed January 13, 1942, announces the revolutionary principle and lays down the startling rule that payment made to expedite *distribution of impounded income* (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) *from land or other property is,* in substance and effect, *capital investment in such land or property*—which rule is contrary to and in conflict with all previous judicial and treasury department interpretations and con-

structions of the Revenue Acts and Rules and Regulations in respect of allowable deductions for expense or loss, and is specifically contrary to the rule announced in the following cases:

First Nat. Bank in Wichita v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283;

Newark Milk & Cream Co. v. *Commissioner,* (C. C. A. 3) 34 F. (2d) 854;

Anahma Realty Corporation v. *Commissioner,* (C. C. A. 2) 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854;

King Amusement Co. v. *Commissioner,* (C. C. A. 6) 44 F. (2d) 708, *certiorari* denied, 282 U. S. 900;

Athol Mfg. Co. v. *Commissioner,* (C. C. A. 1) 54 F. (2d) 230;

Newspaper Printing Co. v. *Commissioner,* (C. C. A. 3) 56 F. (2d) 125;

Falk Corporation v. *Commissioner,* (C. C. A. 7) 60 F. (2d) 204;

Home Trust Co. v. *Commissioner,* (C. C. A. 8) 65 F. (2d) 532;

Clark Thread Co. v. *Commissioner,* (C. C. A. 3) 100 F. (2d) 257.

cited by the Circuit Court in support of its opinion and decision; and said opinion and decision here sought to be reviewed is also specifically contrary to and in conflict with the following additional opinions and decisions of other Circuit Courts and this Honorable Court, *viz:*

On Allowable Expense Deduction.

Kornhauser v. *United States,* 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505;

Bliss v. *Commissioner,* (C. C. A. 5) 57 F. (2d) 984;

Commissioner v. *Wurts-Dundas,* (C. C. A. 2) 54 F. (2d) 515;

Lucas v. *Wofford*, (C. C. A. 5) 49 F. (2d) 1027;
Atwater-Kent Mfg. Co. v. *Commissioner*, (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner*, (C. C. A. 3) 44 F. (2d) 147;
Ill. Central Co. v. *Commissioner*, (C. C. A. 7) 90 F. (2d) 461.

On Allowable Loss Deduction.

F. W. Darling v. *Commissioner*, (C. C. A. 4) 49 F. (2d) 111;
Dayton Co. v. *Commissioner*, (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas*, (C. C. A. 9) 44 F. (2d) 528;
United States v. *S. S. White Dental Mfg. Co.*, 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Commissioner v. *Brown*, (C. C. A. 1) 54 F. (2d) 569-570;
Rhodes v. *Commissioner*, (C. C. A. 1) 100 F. (2d) 966.

(2) The Circuit Court's opinion does not consider or review the Board's Opinion. Said court rendered its own opinion based upon a question of fact expressly not decided by the Board, and a question of law, without deciding it, also expressly avoided by the Board—and said court promulgated and rendered an opinion and decision which is inconsistent on its face, which is contrary to the well settled law as laid down by prior decisions of the Tenth Circuit Court, and which is also in conflict with the decisions and opinions of other Circuit Courts of Appeals and of the Supreme Court of the United States. And said Circuit Court of Appeals for the Tenth Circuit based and grounded its opinion upon an irrelevant narrative of statements contained in the void order of the Secretary of Interior, and completely failed to state or to consider the real, substantive, pertinent and decisive facts connected with, relating to, and a part of, the

Secretary's order, and by so doing, said opinion is based upon a premise directly in conflict with the facts established by the record.

(3) The opinion and decision of the Tenth Circuit Court here sought to be reviewed, in addition to being in conflict with the opinions of other Circuit Courts of Appeals and of the Supreme Court of the United States, will cause great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals, for the reason and because of the fact that *said court's opinion holds that payment to expedite distribution of impounded income from property* (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) *is,* in substance and effect, *capital investment in such property.*

Wherefore, your petitioner prays that this Court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket No. 2333, *O. O. Owens, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment and decree herein of the said United States Circuit Court of Appeals for the Tenth Circuit, and the decision herein of the United States Board of Tax Appeals in docket No. 14,379, *O. O. Owens, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* before said board, may be reversed by this Court, and for